IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 595 .

ESTATE OF ANNIE PRESTON BASSETT,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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HOWARD M. BASSETT,
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THE COURT PRESS, N. Y. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. .

ESTATE OF ANNIE PRESTON BASSETT,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Preston R. Bassett, as Executor of the Estate of Annie Preston Bassett, deceased, respectfully prays for a writ of certiorari to the United States Court of Appeals for the Second Circuit to review a judgment of that court entered in this case on November 29, 1948; and therefore shows as follows:

I.

A SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

This action involves the estate tax liability against the foregoing estate. The United States Court of

Appeals for the Second Circuit affirmed (R. p. 164) a decision, favorable to the respondent in The Tax Court of the United States (R. p. 27).

Preston R. Bassett as successor executor of the estate of Annie Preston Bassett, deceased, has been substituted as petitioner herein, in the place and stead of Edward M. Bassett, Executor, deceased, by order of The Tax Court of the United States, dated January 26, 1949, Docket Number 9639, and the caption of this proceeding has been changed accordingly.

The decedent, Annie P. Bassett, died at Brooklyn, N. Y., at the age of 76 years, on January 22, 1942. She was survived by her husband, her five children and her fifteen grandchildren.

The decedent and her husband had practiced in their lives a financial partnership in the division of their property and in together making gifts to their children. Her husband began making gifts to her soon after their marriage in 1890 and continued the plan throughout their lives at a rate sufficient to keep her estate about equal to his in size (R. p. 155).

In 1920 husband and wife began a plan of making liberal gifts to their children. In two years the husband made eleven gifts totaling $68,750.00. In the following two years the decedent made eight gifts totaling $50,000.00. One hundred and eight gifts having a total value of $330,000.00 were made by them between 1920 and 1940, during which twenty year period only six years passed without some gift being made to one or another of their children (R. pp. 28, 149-153).

After the adoption of the Gift Tax Law in 1932, the gifts they made were all within the annual exclusion limits of $5,000.00 and later $4,000.00 to any one person. The last of the gifts made before the

period in question were made in March, 1940, by both husband and wife simultaneously. The gift making program had not been uniform but had been fairly constant. The fluctuations were the normal result of changing business conditions and the variations in the needs and circumstances of their children (R. pp. 28, 149).

Beginning in 1941, the period in question, the program of these gift-making parents was increased to the extent that was permissable to them for making simultaneous gifts within the non-taxable range of the gift tax law. Gifts were made by both parents to all their children and their families to take advantage of the lifetime exemptions of $40,000.00 allowed to each donor, as well as some twenty gifts under the annual exclusions.

Their combined estates, amounting to about $600,000.00 at this time, was invested in several hundred small mortgages being serviced by her husband. The responsibilities attendant upon this work had become a considerable burden to him. His eyesight began to fail at this time, requiring that he surrender his office work. It was a tragic and dramatic event for him to be gradually and relentlessly shut off from the world. The partners, husband and wife, felt that it was imperative for the sake of his health to take another step in their lifelong plan of gift-making in order to relieve him as far as possible from the worries which were seriously interfering with his sleep (R. p. 98).

Their gift program for this reason was stepped up during 1941 and within a year the husband's condition required three eye operations and the dissolution of his law firm (R. p. 99).

Another compelling reason for the filling out of their gift program was the financial needs of their daughter Marion. She lived with her husband and two sons in suburban New Jersey but was having marital trouble, and on the verge of breaking up her family. Early in 1941 Marion's affairs reached a climax. She took steps to leave her husband who could no longer provide for her and was himself in debt. She moved to a small apartment in New York City and began divorce proceedings. Her parents were anxious to help her to the limit financially and numerous gifts of 1941 were the natural consequence (R. pp. 96, 97, 99).

During this period the decedent was occupied with many and varied social and religious activities in her community. In November alone, she had two large club meetings at her home and entertained a large family gathering at Thanksgiving time. She also had two winter coats repaired and made other plans for the future (R. pp. 136, 137).

According to the husband, the survivor of this gift-making partnership, the foregoing facts were the only facts which actuated him and his wife in their planning and giving. The only motives for their gifts were the motives which he and his wife shared together, which were supported by the surrounding circumstances regarding their children,—their own diminishing needs, —and their desire to enjoy together the comfort and ease which busy lives had earned for them (R. pp. 101, 137).

From January to December, 1941 they reduced their estates from a combined $600,000.00 to a combined

$300,000.00 by simultaneous gifts to their children as follows (R. pp. 129, 153):

January,		1941,	five	gifts	by	husband	$ 4,000	each	$ 20,000
"		"	"	"	"	wife	"	"	20,000
June	21,	"	"	"	"	husband	12,000	"	60,000
"	"	"	"	"	"	wife	"	"	60,000
October	1,	"	fifteen	"	"	husband	4,000	"	60,000
"	"	"	"	"	"	wife	"	"	60,000
November	1,	"	five	"	"	husband	"	"	20,000
"	"	"	"	"	"	wife	"	"	20,000
							Total		$320,000

The foregoing gifts by the wife are in issue on the grounds that they were made in contemplation of death (R. p. 22). She came down with a cold which developed into pneumonia in December 1941. The family doctor concluded that she had a cancer of the lung but the decedent was never told what her real condition was (R. p. 30). Nothing in her conduct or conversation with those in daily contact with her ever indicated that she suspected that she might have something seriously wrong (R. pp. 101, 137).

Recovering from the pneumonia in January, 1942 she was feeling much better. She then made eight more gifts under the new annual exclusions. Shortly afterward her condition grew worse and she died January 22, 1942. Her husband made twenty-five additional gifts during 1942 bringing the total value to about $100,000.00 for their gifts for that year. Her estate amounted to about $85,000.00 at her death and an estate tax of $2,068.39 was paid (R. p. 23).

Her husband as executor reported all the small gifts she had made under Schedule G. of her estate tax return. The Commissioner of Internal Revenue assessed a deficiency tax of $61,204.30 against the estate, September 7, 1945, on the ground that the

transfers made within two years of death were made in contemplation of death (R. p. 22).

A timely appeal for a redetermination was made (R. p. 3) and a decision of The Tax Court of the United States was rendered in which the early gifts of March 1940 were upheld without comment but the gifts of January 1941 and following were held taxable. The court made no mention of the concurrent nature of the gifts (R. pp. 27-40).

Upon appeal the United States Court of Appeals for the Second Circuit affirmed the Tax Court decision by invoking the statutory presumption on the ground that "the gifts aggregated" a "material part" of decedent's estate even though individually "none of the separate gifts in this case was a 'material part' ".

II.

A STATEMENT PARTICULARLY DISCLOSING THE BASIS UPON WHICH IT IS CONTENDED THAT THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION TO REVIEW THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

(a) The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States.

The Supreme Court of the United States has jurisdiction to review the judgment of the United States Court of Appeals by reason of the provisions of Section 1254 of Title 28 of the United States Code (Public Law 773—80th Congress, Chapter 646, 2d Session).

(b) The date of the judgment sought to be reviewed and the date upon which the petition for a writ of certiorari is presented.

(1) The date of the judgment sought to be reviewed is November 29, 1948 (R. p. 164).

(2) The date upon which the petition for a writ of certiorari is presented is February 25, 1949.

III.

THE QUESTION PRESENTED.

The question presented is as follows:

Are the following gifts made by the donor includable in the gross estate as transfers made in contemplation of death within the meaning of Section 811 (c) of the Internal Revenue Code:

January	25, 1941—	5	gifts—total	$ 20,000.00
June	21, 1941—	5	" — "	60,000.00
October	1, 1941—	15	" — "	60,000.00
November	1, 1941—	5	" — "	20,000.00
January	12, 1942—	8	" — "	32,000.00
				$192,000.00

IV.

THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1.) The United States Court of Appeals for the Second Circuit has held in this case, that the statutory presumption, which applies to "any transfer of a

material part", also applies to gifts, which may aggregate a material part, although by the Circuit Court's own statement, "none of the separate gifts in this case was a material part of the decedent's property."

This is a momentous decision for the respondent, Commissioner of Internal Revenue, as well as for the petitioner, because respondent's auditors in reviewing estate tax returns since the adoption of the Act in 1916 have consistently disregarded as not in contemplation of death all gifts of less than $5,000.00 solely because of size. In view of this long established practice the respondent should desire as well as the petitioner a ruling by this court on the matter.

The necessary effect of this decision is to decide an important question of federal law which has not been, but should be, settled by the Supreme Court of the United States.

2.) The United States Court of Appeals for the Second Circuit, by affirming the decision of The Tax Court of the United States, herein has sanctioned a clear departure from the accepted and usual course of judicial procedure for this reason; the Tax Court plainly disregarded the best evidence of the decedent's motives by failing to take cognizance of the surviving gift-making partner's motives, as shown by his sworn testimony, and by substituting in the place of such evidence mere conjecture or surmise.

The ascertained and proven facts relating to her state of mind and the reasons actuating her and her husband in their joint gift making, supported by evidence of a need for gift making at that time should not be set aside without comment in favor of a supposition entirely unsupported by the evidence.

WHEREFORE, your petitioner respectfully prays that Writ of Certiorari be issued out of and under the eal of this honorable Court directed to the United States Court of Appeals for the Second Circuit, commanding that court to certify and send to this Court or its review and determination, on a day certain o be therein named, a full and complete transcript f the record and all proceedings in this cause to the nd that the said cause may be reviewed and determined by this Court according to law; and that your petitioner may have such other and further relief as o this Court may seem proper and in conformity with law.

And your petitioner will ever pray.

CHAUNCEY P. CARTER,
Counsel for Petitioner.

PREW SAVOY
HOWARD M. BASSETT,
Of Counsel.

Dated—Feb. 25th, 1949.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. .

ESTATE OF ANNIE PRESTON BASSETT,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions of the Courts Below.

The opinion of the United States Court of Appeals for the Second Circuit is reported in 170 F. (2d) 916 (see pp. 164-167 of the Record). The opinion of The Tax Court of the United States is a memorandum decision reported in 6 T. C. M. 887 (see pp. 27-40 of the Record).

Jurisdiction.

The grounds on which the jurisdiction of the Supreme Court of the United States is invoked are set forth beginning at page 6 herein, in the petition for writ of certiorari.

Statement of the Case.

The facts are as set forth, beginning at page 1 herein, in the petition for writ of certiorari.

Specification of Errors.

1. The United States Court of Appeals for the Second Circuit erred in finding and holding that the gifts totaling $192,000.00 made by the donor during 1941 and 1942 constituted part of the gross estate of the decedent herein.

2. The United States Court of Appeals for the Second Circuit erred in failing to find and hold that some or all of the five groups of gifts made by the decedent were natural *inter vivos* gifts made for purposes associated with life and without any thought or contemplation of death within the meaning of Section 811 (c) of the Internal Revenue Code.

3. The United States Court of Appeals for the Second Circuit erred in affirming the decision of The Tax Court of the United States.

4. The United States Court of Appeals for the Second Circuit erred in entering judgment for the respondent.

Summary of Argument.

1.) The statutory presumption created by Section 811 (c) of the Internal Revenue Code applies to "Any transfer" if it is a material part of the decedent's property made within two years of his death, but it has never been held to apply to the

"aggregate" of transfers no one of which is a material part.

The invocation of this presumption by the United States Court of Appeals for the Second Circuit herein, is clearly erroneous, not only as a misinterpretation of the Act, but as counter to the intention of the Act, which is to exclude minor gifts as expressed in the gift tax statute, and minor transfers made during the decedent's lifetime, as expressed in the estate tax statute. The interpretation is also counter to the express regulations of the Treasury Department and the practice of the Bureau of Internal Revenue which have uniformly and explicitly held that transfers of less than $5,000.00 made by the decedent during his lifetime should not be reported by his executor and should not be taken into account by the department auditors in determining the decedent's taxable estate.

It is also counter to everyday experience that elderly people of means customarily make gifts to relatives, the aggregate of which, over a two year period might constitute a material part, without in any way indicating that contemplation of death was the motive. The fact that there are no cases on the subject is in itself significant. The Tax Court has failed to consider the matter in the only opportunity it has had to our knowledge.

2.) The decision of The Tax Court of the United States herein has been based upon the premise that the deceased donor was acting independently and alone in making her gifts during 1941 and 1942 herein, and not in conjunction with a surviving gift-making partner. The testimony that she was acting jointly with her husband and making gifts concurrently with

him has not only been disregarded but it has not even been referred to in the Tax Court opinion as one of the pertinent facts in the case.

The United States Court of Appeals for the Second Circuit has affirmed this decision and tacitly sanctioned this improper procedure based as it is upon a false and untenable premise. The best evidence of the deceased donor's motives is the testimony of her gift-making partner in regard to their innumerable conversations, the understandings and objectives sought to be obtained, and the supporting circumstances which were deemed important to them in prompting the actions that they were jointly taking.

The Tax Court decision is based upon a conjecture that the deceased donor had figured out for herself that she did not have long to live although she had no information on which to base her conclusion. As a result it held that the dominant motive in her case was contemplation of death. This speculation falls short of proof and cannot stand against the ascertained and proven facts relating to her actual conversations, actual expressed concerns and motives and the undisputed and innumerable supporting facts and circumstances surrounding herself and her family, as well as the long continued practice of making liberal gifts to her children in conjunction with her husband.

ARGUMENT.

I.

The statutory presumption does not apply to gifts of less than $5,000 even if they aggregate a material part.

The Commissioner makes his assessments under Section 811 of the Internal Revenue Code, which provides for the taxation of gifts made in contemplation of death. This section reads as follows:

> "Code. Section 811. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, * * *
>
> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of * * * his death, * * *"

As an aid in the collection of this tax the Congress has given the Treasury the benefit of a statutory presumption which is a part of the same section and reads as follows:

> "Any transfer of a material part of his (decedent's) property in the nature of a final disposition or distribution thereof made by the decedent within two years prior to his death * * * shall, unless shown to the contrary, be deemed to have been made in contemplation of death."

The United States Court of Appeals for the Second Circuit invoked the statutory presumption in this case on the following grounds:

> "While it may be that none of the separate gifts in this case was a 'material part' of the decedent's property, yet, as the gifts aggregated over half of her estate, the statutory presumption applies."

By definition, a transfer is an act by which the property of one person is conveyed or vested in another person. If the instrument of conveyance has two or more grantors, or two or more grantees, it may still be called a transfer by using the word as synonymous with the instrument of transfer. If, however, the acts of the grantor consist of drawing checks, and mortgage assignments, and the delivery of bonds to various persons, as happened in the gifts involved in this case, there was not one transfer, but a series of transfers.

By definition "a material part" means a substantial or considerable part, in contrast to a minor or inconsiderable part. Both the Estate Tax Law and the Gift Tax Law have established reasonable limits for minor or inconsiderable gifts, which should be considered in determining, at least the minimum, of what may be deemed a "material part". This minimum under the Gift Tax Law was $5,000.00 under the Act of 1932, and was reduced to $4,000.00 by the 1938 Act, and $3,000.00 by the 1942 Act.

The Estate Tax Law (Revenue Act of 1926) contained the following sentence in Section 302 (c) expressly limiting the tax liability in contemplation of death gifts to the excess over $5,000.00, as follows:

Section 302 (c)—"Where within two years

prior to his death he has made a transfer or transfers * * * and the value or aggregate value to any one person is over $5,000.00 then to the extent of such excess such transfer or transfers shall be deemed to have been made in contemplation of death."

This provision not only set a minimum limit to the statutory presumption, but it also excluded the first $5,000.00 of any transfer, even though it was in fact, made in contemplation of death and taxable. For the latter reason the provision was omitted in later revisions of this section but the minimum limit on the statutory presumption continues in practice and is embodied in the Treasury Regulations accompanying this section as follows:

8/.15

Regulation 105—*Article ~~17~~—Transfers during life*:

5th paragraph—"All transfers made by the decedent during his life of an amount of $5,000.00 or more, * * * must be disclosed in the return, whether the executor regards such transfers as subject to the tax or not."

8/.16

Art. ~~16~~ *Transfers in contemplation of death*:

5th paragraph—"If the executor contends that the value of a transfer of $5,000.00 or more made by the decedent * * * should not be included in the gross estate because he considers that such transfer was not made in contemplation of death, he should file * * * etc."

The legal effect of the foregoing is perfectly clear. It is that the executor under no circumstances is required to report in the return any transfer made

by the decedent of less than $5,000.00, and if any transfer of less than $5,000.00 was made in contemplation of death, it nevertheless, need not be reported in the return.

The Revenue Act deliberately recognizes that gifts of minor importance must be excluded from the point of view both of convenience and purposes in view. It is a recognition that wedding gifts and Christmas presents do not come within the purview of the Revenue Act, and also, that annual sums of minor amounts are customarily given by parents of means to meet living expenses and ordinary needs of children with growing families and grandchildren.

In *Estate of Fletcher E. Awrey,* 5 T. C. 222, the decedent made sixteen gifts of about $5,000.00 each within two years of his death, totaling $80,900.00, being about one-half of his estate. Neither the Commissioner nor the Tax Court attempted to invoke the statutory presumption although the gifts obviously aggregated a material part of decedent's estate.

In *Estate of George H. Kent,* 6 T. C. M. 933, the decedent made two gifts of $4,000.00 and two of $3,500.00 each within two years of his death, but no attempt was made to invoke the statutory presumption.

II.

The surviving husband's testimony is the best evidence of his deceased partner's motives against which mere conjecture cannot stand.

The issue in contemplation of death cases is essentially one of fact. But the test is always to be found in motive. We are required to look into the state of mind of a woman now dead in order to find her motive when she made the particular transfers of property. The decedent is, of course, unavailable to testify. Accordingly, recourse must be had to every variety of circumstantial evidence available.

The Tax Court proceeded to investigate what the decedent might have concluded from the fact that she had had some X-ray treatments of her chest in June, 1941; that she had a breast removed in 1938, after which she also had some X-ray treatments, and from the fact that she had a chronic bronchitis. This enquiry into apparently remote circumstances was conducted to ferret out the decedent's motivation for her gifts and from these facts the Court concluded that the dominant motive for making the transfers was contemplation of death.

The testimony of the donor's sister, Miss Belle Preston, shows that she herself had had a breast removed because of a tumor in it some twenty years previously without any ill effects. Miss Preston testified that the decedent spoke freely and frequently of her own similar operation to her intimate friends with complete self assurance that the matter was of no consequence (R. p. 135). The Court made no reference to this testimony.

The decedent had a mild but chronic bronchitis for many years before her death which had no connection

with cancer. Her sister testified that decedent took these X-ray treatments to relieve her bronchitis (R. p. 142), and the family doctor testified that the effect was to relieve her bronchitis (R. pp. 81, 83).

The Tax Court's enquiry at best was inconclusive since there was no evidence that decedent was concerned about her health and it is entirely believable that her thoughts on the subject of her health were the same as her husband's and her sister's. The court made no reference to this testimony.

Since the decedent is unavailable to testify, we must have reference to the particular facts which would most likely be relevant in her mind. The testimony shows conclusively that a financial partnership existed between husband and wife and that joint action was taken by them in making the exact gifts here in issue pursuant to a common plan. The Tax Court has made no reference to this testimony.

It must be assumed that the motives of a husband and wife who had previously acted in accord on all financial matters would be identical in making simultaneous gifts to the same persons. The husband's testimony proved that their motives were associated with life and not with death. The Commissioner offered no evidence to contradict that of the husband and, therefore, it must stand as given.

In such case the husband's motives must be considered as evidence of the wife's motives and should prevail over guess work to determine the decedent's motives as was done by the Tax Court.

There was no occasion for the wife to consider her property as a separate entity from her husband's or to concern herself about the legal and taxation problems perplexing most people of her financial means. There is no evidence that she did concern herself about such matters.

The Tax Court cited two cases in support of the proposition that gifts may themselves speak so eloquently of testamentary disposition that contrary evidence would be superfluous.

In *Land Title & Trust Company* v. *McCaughn,* 79 Fed. Sup. 602, the donor made a single trust of his entire estate leaving himself without income or property. In the other case, *Farmers Loan and Trust Company* v. *Bowers,* 68 Fed. (2d) 916, the donor, William Waldorf Astor, made a transfer in trust to persons of such wealth in their own right as to raise the question whether any purpose associated with life was served.

In the present case the donor's transfers were not without explanation. The volume of her gifts was no greater than the volume of her husband's gifts. Her estate was as large as his before the transfers took place and equal to his after their gift plans were completed.

The daughter Marion and her boys were apparently in greater financial need than any of her children had been when she made them gifts twenty years earlier.

The reduction in income tax liability was about one thousand dollars to each gift-making partner, and the freedom from business worries and responsibilities upon the husband was a considerable factor in the minds of each.

The pattern that was followed had been established by both as to their five children and twice during the previous five years as to the fifteen grandchildren by the husband partner.

The conversations between husband and wife have not been reported in detail but that there were many such conversations is obvious from the testimony of the husband and from the general implication that every

husband and wife have many occasions and many inducements to talk things over together and make plans for their future as well as in the carrying out of those plans. Could the witness have repeated such conversations in detail for the record it would have made a voluminous but vivid portrayal of decedent's true state of mind so convincing that any such enquiry as pursued by the Tax Court would have been a plain departure from the known facts. These gifts were planned in each case to meet the urgent needs of existing and troublesome situations.

The presumption created by the statute or the supposition arrived at by the Tax Court that the transfers in question were made in contemplation of death are clearly out of order and cannot stand against the ascertained and proven facts showing the contrary to be true.

The best evidence of the decedent's state of mind at the times she made the gifts are her conversations with her husband who was making simultaneous gifts. The best evidence of her motives are the statements of her gift-making partner supported as they are by the compelling circumstances affecting their own and their children's happiness and well being.

CONCLUSION.

It is, therefore, respectfully submitted that the petition for writ of certiorari should be granted as prayed for.

Respectfully submitted,

CHAUNCEY P. CARTER,
Counsel for Petitioner.

PREW SAVOY
HOWARD M. BASSETT,
Of Counsel.

FILE COPY

Supreme Court of the United States

OCTOBER TERM, 19[illegible]

Board of Alien Property Register,

Petitioner,

v.

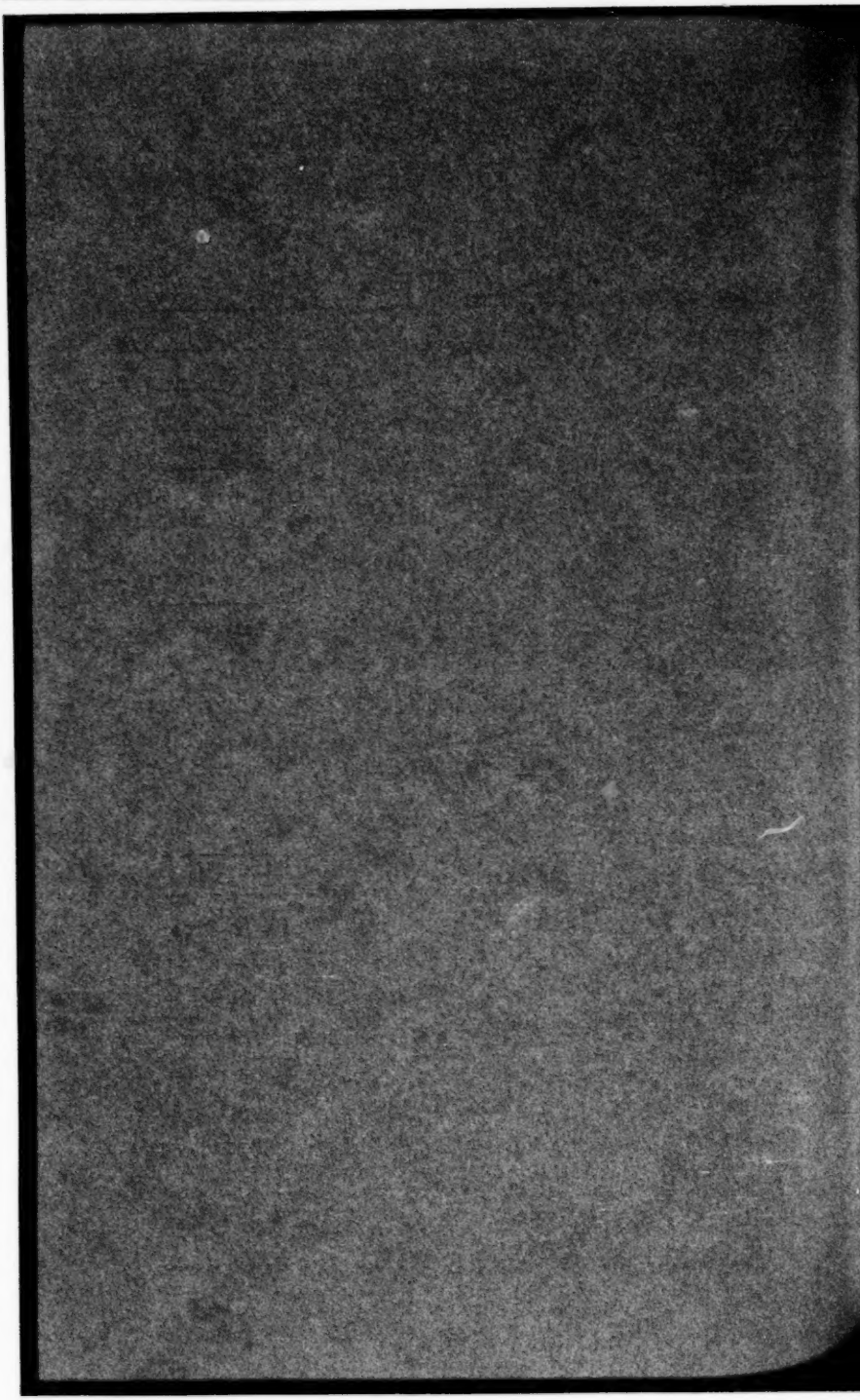
Commissioner of Internal Revenue,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF THE PETITION

Percy Savoy,
Counsel for Petitioner.

Chauncey P. Carter
Howard M. Barrett,
Of Counsel.



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IN THE

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OCTOBER TERM, 1948

No. 595

ESTATE OF ANNIE PRESTON BASSETT,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

QUESTION PRESENTED

Are the following gifts, made by the decedent, to be included in the gross estate, as transfers made in contemplation of death, within the meaning of Section 811(c) of the Internal Revenue Code?

January 25, 1941	Preston R. Bassett, Son	$ 3,950.00
"	Marion B. Luitweiler, Daughter	3,950.00
"	Isabel B. Wasson, Daughter	3,950.00
"	Howard M. Bassett, Son	3,950.00
"	Helen B. Hauser, Daughter	3,950.00
June 21, 1941	Preston R. Bassett, Son	$11,750.00
"	Marion B. Luitweiler, Daughter	11,791.00
"	Isabel B. Wasson, Daughter	11,850.00
"	Howard M. Bassett, Son	11,884.00
"	Helen B. Hauser, Daughter	11,983.00
October 1, 1941	Margaret Bassett, Grandchild	$ 3,000.00
"	Preston Bassett, Jr., Grandchild	3,000.00
"	Allen Bassett, Grandchild	3,000.00
"	William Bassett, Grandchild	3,000.00
"	Elizabeth Ann Bassett, Grandchild	4,000.00
"	Edward M. Bassett, II, Grandchild	4,000.00
"	Dorothy Bassett, Grandchild	4,000.00
"	Bobby Luitweiler, Grandchild	4,000.00
"	Jimmy Luitweiler, Grandchild	4,000.00
"	Marion Luitweiler, Daughter	4,000.00
"	Elizabeth Wasson, Grandchild	4,000.00
"	Edward Wasson, Grandchild	4,000.00
"	Anne Wasson, Grandchild	4,000.00
"	Joan Hauser, Grandchild	4,000.00
"	Mary Hauser, Grandchild	4,000.00
"	Edward Hauser, Grandchild	4,000.00
November 1, 1941	Jeanne Bassett, Daughter-In-Law	$3,915.00
"	Marion Luitweiler, Daughter	3,915.00
"	Lorion Bassett, Daughter-In-Law	3,915.00
"	Alfred Hauser, Son-In-Law	3,915.00
"	Theron Wasson, Son-In-Law	3,915.00
January 12, 1942	Preston Bassett, Son	$ 3,988.00
"	Jeanne Bassett, Daughter-In-Law	3,988.00
"	Isabel Wasson, Daughter	3,988.00
"	Theron Wasson, Son-In-Law	3,988.00
"	Helen Hauser, Daughter	3,988.00
"	Alfred Hauser, Son-In-Law	3,988.00
"	Howard Bassett, Son	3,988.00
"	Lorion Bassett, Daughter-In-Law	3,988.00

REASONS FOR GRANTING THE WRIT

(1) *The Court of Appeals erroneously held that the statutory presumption, which applies to "any transfer of a material part" of the property of the decedent, also applies to individual gifts, which may aggregate a material part, although, by that Court's own statement, "none of the separate gifts in this case was a material part, of the decedent's property."*

The portion of Section 811(c) of the Internal Revenue Code applied to this case by both the Tax Court and the Court of Appeals, reads, as follows:

> ". . . *Any transfer of a material part* of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this subchapter;"

This sentence has appeared in all taxing statutes since the Revenue Act of 1916 and was made a part of the Internal Revenue Code in 1939.

In the Revenue Act of 1926, the sentence involved herein is preceded by the following:

> ". . . *Where within two years prior to his death* but after the enactment of this Act and without such a consideration *the decedent has made a transfer or transfers,* by trust or otherwise, *of any of his property,* or an interest therein, *not admitted or shown to have been made in contemplation of* or intended to take effect in possession or enjoyment at or after his *death, and the value or aggregate value,* at the time of such death, *of the property* or interest *so transferred to any one person is in excess of $5,000 then, to the extent of such excess, such transfer or transfers shall be deemed and held to have been made in contemplation of death* within the meaning of this title." (Italics supplied.)

Again, the gift tax, under the Revenue Act of 1924, was imposed, after deducting *annually* an *exemption* of $50,000, and "gifts the *aggregate amount of which to any one person does not exceed $500.*" (Sec. 321.) This provision was repealed by the Revenue Act of 1926.

A tax was again imposed on net gifts by the Revenue Act of 1932. The first $5,000 paid to any one person in any one year was not to be included in the net gifts taxable. (Sec. 504(b)). The deduction of an exemption of $50,000, in the computation of net gifts taxable, was reduced, for any taxable year, by "the aggregate of the amounts claimed and allowed as specific exemption for preceding calendar years." (Sec. 505(a)(1)).

Thus, in both the Estate Tax and Gift Tax provisions, whenever Congress intended to cover the aggregate of transfers or gifts, it said so in clear, unmistakable language. It did not do so, in the last sentence of Section 811(c), involved herein.

The provisions of the statutes mentioned show that Congress knew in 1916, 1926, 1932 and 1939, and still knows, the difference between the aggregate of transfers, and "any transfer of a material part" of a person's property. In the only statute where Congress sought to tax both the aggregate of transfers and any transfer of a material part, the Revenue Act of 1926, it is clear that Congress had the two different situations in mind and used the appropriate language to express each.

It is equally clear that the last sentence of Sec 811(c), that involved herein, covers only *a transfer of a material part* and not the aggregate of transfers of small amounts which, when added together, constitute a material part. Had Congress intended otherwise, Congress would have said so in unmistakable language, as it did when it sought to tax certain aggregates of transfers, in 1926 and 1932. Yet, the Courts below both had to, and did, add all the individual gifts, in order to bring this case within the statutory presumption, without statutory authority. This is reviewable error.

Respondent, in its Brief in Opposition, p. 8, suggests that the Court of Appeals was correct in adding the individual small gifts, so that the statutory presumption will apply. Otherwise, it is said, a person could give away his entire estate in small amounts, without fear of the presumption. The fact is that a person may dispose of his entire estate, by giving in small amounts excluded from the net gifts, or exempted, without fear of the presumption, under the statute as written. Of course, the first sentence covers all transfers, including small transfers, actually made in contemplation of death, but the presumption does not apply to them.

The fact that the regulations provide that only "transfers made by the decedent during his life of an amount of $5,000, or more, * * * must be disclosed in the return" of the estate shows that the Bureau, until this case, followed the statute as written and without adding to it.

The question of Federal law involved is definitely of national importance. Appendix I shows the thousands of gift tax returns filed annually since the Revenue Act of 1932. More gift tax returns have been filed, on account of gifts made in 1941 and thereafter, than estate tax returns. Too, gift tax returns are filed, after the exclusions of $5,000, 1932–1938; $4,000, 1939–1942; $3,000, 1943–1946, per person per year, and after exemptions of $50,000, or $40,000, or $30,000.

If this decision is to stand and be considered the law in the Second Circuit, and, if followed, very obviously a large number of donors can be taxed to an extent not intended or contemplated by Congress.

That the question is of national importance is further evidenced by the fact that experts of the Chamber of Commerce testified on the subject of exclusions in the hearings in connection with the Revenue Act of 1942. (Appendix III). It is well known that their testimony is limited to questions of general importance.

It is very obviously important to thousands of taxpayers, who have made excludable gifts during their lifetimes, that

only a transfer of a material portion of their property is subject to the two-year presumption, and that individual gifts, excluded or exempted under the gift tax law, are not to be added together and subjected to the presumption. If Congress desires to have such gifts totalled and subjected to the presumption, it has the power to do so by statute. It is not within the power of the Courts to do so by decision. The Courts below committed reviewable error in so doing, and their action should be reversed by this Court.

Respondent, at page 6 of the Brief in Opposition, says that the Tax Court based its "conclusion that the gifts made in 1941 and 1942 were made in contemplation of death * * * not upon the statutory presumption but upon the record as a whole". Respondent's statement is based upon the claim that gifts made on March 1, 1940, though within two years of the date of death, "were not included in the Tax Court's finding."

The fact of the matter is that these gifts, made in 1940, *are* included in the findings of fact (R. 31) but are *not* included in the Opinion, where the Tax Court has incorporated its ultimate conclusions of fact.

Furthermore, the statutory language relied upon by the Tax Court as the sole basis for its Opinion is that of the statutory presumption. (R. 33).

Even if the Tax Court had relied upon the record as a whole, or the statute as a whole, and not on the statutory presumption, which is not the case, Petitioner, under (2), which follows, will urge that the Tax Court and the Court of Appeals committed errors, which this Court should review.

(2) *The Circuit Court of Appeals erred in sanctioning a clear departure from the accepted and usual course of judicial proceeding, by failing to reverse the ultimate conclusion of the Tax Court that the gifts were made in contemplation of death, contained in the Opinion and not found in, nor required by, the findings of fact, contrary to the uncontradicted testimony and based on pure conjecture.*

That the ultimate conclusion or finding of fact that gifts were made in contemplation of death is to be reached in the findings of fact and not in the Opinion is recognized in *United States* v. *Wells,* 283 U. S. 102, 120, where this Court said:

> "We are not at liberty to refer to the Opinion for additional findings."

While, in that case, the ultimate conclusion followed naturally from the findings, that is not true in the subject case. The findings of fact herein amply support the conclusion that the gifts in question were *not* made in contemplation of death. The decision below is in clear conflict with what was said by this Court (but not there applied) in *United States* v. *Wells, supra.*

That the Tax Court may not ignore the uncontradicted testimony and make findings of fact based on pure conjecture, and that, when it does so, it is reversible error, is amply supported by decisions of the Circuit Courts of Appeals. *Chicago Railway Equipment Co.* v. *Blair* (C. C. A. 7th), 20 F. (2d) 10; *Boggs & Buhl* v. *Commissioner* (C. C. A. 3rd), 34 F. (2d) 859; *Citrus Soap Co. of California* v. *Lucas* (C. C. A. 9th), 42 F. (2d) 372; *Pittsburgh Hotels Co.* v. *Commissioner* (C. C. A. 3rd), 43 F. (2d) 345, cert. den. 275 U. S. 546; *Planters' Operating Co.* v. *Commissioner* (C. C. A. 8th), 55 F. (2d) 583.

The principle—the accepted course of judicial proceeding—contained in those cases and applicable herein is well expressed, in *Boggs & Buhl* v. *Commissioner, supra:*

"While the board may, as a general principle, reject ex-

> pert testimony and reach a conclusion in accordance with its own knowledge, experience, and judgment, yet it must have knowledge of and experience with the particular subject under consideration. There is no evidence that the board had any independent and personal knowledge whatever of the business, reputation, and good will of the petitioner. Therefore it could not set aside or disregard all the positive and affirmative evidence as to the value of the good will, and base its conclusion upon conjecture."

It is respectfully urged that the rule applied to taxpayers in the Third, Seventh, Eighth and Ninth Circuits should apply equally to taxpayers in the Second Circuit.

The 80th Congress, by Section 36 of Public Law 773, effective September 1, 1948, defining the jurisdiction of the United States Circuit Courts of Appeals, required the Court of Appeals to follow the foregoing decisions of the other Circuit Courts. This question has not been, and should be, settled by this Court.

Respondent, in its Brief in Opposition, p. 6, asserts that there is ample evidence to support the Tax Court's conclusion that the gifts in question were made in contemplation of death. "Hence, its finding should be accepted" by this Court. *Allen* v. *Trust Co. of Georgia,* 326 U. S. 630, and *United States* v. *O'Donnell,* 303 U. S. 501, 508, are cited in support thereof.

Petitioner again reiterates that this conclusion—the ultimate fact—is contained, not in the findings of fact, but in the Opinion, and that resort cannot be had to the Opinion to supplement its findings.

Furthermore, in reaching this conclusion, in its Opinion, the Member of the Tax Court ignored the uncontradicted testimony of unimpeachable witnesses and based his conclusion on pure conjecture.

In these circumstances, the cases cited by Respondent are not authority. *Allen* v. *Trust Co. of Georgia, supra,* cites *United States* v. *O'Donnell, supra,* which, in turn, cites among other cases *United States* v. *State Invest. Co.,* 264 U. S. 206,

Shappirio v. *Goldberg*, 192 U. S. 232, 240; *Page* v. *Rogers*, 211 U. S. 575, 577; *Washington Securities Co.* v. *United States*, 234 U. S. 76, 78, and *National Bank* v. *Shackelford*, 239 U. S. 81.

In *United States* v. *State Invest. Co., supra*, this Court noted that the question of a boundary is one of fact and that the district court and the court of appeals had determined the boundary "from the evidence", and said, at page 211:

> "Under the well-settled rule these concurrent findings on questions of fact will be accepted by this court *unless clear error is shown.* (Cases)
>
> "*An examination of the evidence*—which need not be recited here—discloses no such error; and, on the contrary, leads us to the conclusion that the findings of the lower courts are in accordance with the weight of the testimony." (Italics supplied).

The evidence was examined to see if error had been committed in the findings of fact, to the prejudice of the appellants, in each of the other cases cited above.

Too, there was not presented in any of those cases the question herein—whether the Tax Court is to be permitted to make findings of fact, in its Opinion, contrary to the evidence, and whether the sanctioning of such a procedure by the Court of Appeals calls for a review and reversal of its decision by this Court.

Petitioner respectfully urges that herein there is clear error shown, as the ultimate conclusion of fact of the Tax Court is in its Opinion and is contrary to the uncontradicted testimony. There should, therefore, be a review by this Court, and the decision below should be reversed, by application of the rules of law cited by Petitioner above.

The witnesses for Petitioner were two persons in their eighties (R. 56), with nothing to gain personally by not telling the absolute truth, and the Doctor. The longevity of decedent's family (R. 138), the true state of mind of decedent, looking toward future living and not contemplating death, as shown by her acts and conversations (R. 101–

102, 108, 134–138, 143), the history of gift-making by decedent and her husband, *jointly*, under a common plan, for many years (R. 31 and 150, 69–72, 95–100, 124–125, 131–133), for valid reasons having no connection with death, all supported by uncontradicted testimony, while partially to be found in the findings of fact, were ignored by the Tax Court in reaching its ultimate conclusion. Finally, the true dominating and impelling motives for the gifts made by both decedent and her husband, in 1941 and 1942, are lightly brushed aside (R. 36), in favor of death as the motive, based upon nothing but conjecture.

The ultimate conclusion that the gifts were made in contemplation of death, in the Opinion, is based *solely* on the Member's belief that, being an intelligent and religious person, the decedent must have known that she had cancer, in 1938, and thereafter, so that the gifts made in 1941 and 1942 were made in contemplation of death. Yet, the Doctor, an expert in operations involving tumors and cancer, said, on cross examination, p. 91:

> "Q. Doctor, you have, in your thirty years of practice, treated many cancer patients? A. Yes, sir.
>
> "Q. And you make it a practice of not telling the patient exactly what the difficulty is? A. Yes, sir.
>
> "Q. Will you tell us, please, whether or not, from your experience, you have not found that the patient generally figures it out for himself correctly? A. Well, sir, it is surprising how often they don't find it out correctly. They are dying of cancer, and they attribute it to something else. That is a known fact.
>
> "I now have two cancers of the lung, and neither one of them knows what it is, and one of them is bleeding.
>
> "You would expect them to know, but they don't know.
>
> "Q. Would that be true as to cancer of the breast? A. Most women are suspicious of tumors, but few take them or know them for what they are. Once you remove them, and they are not bothered, they don't know it. They haven't any knowledge of what it is.

"I have had people living eighteen or twenty years after that has happened. Usually, if you get them to live over five years, usually you will have them permanently well."

* * * * *

There are two subsidiary findings of the Tax Court and two such conclusions in its Opinion, which require comment, because they seem to have influenced the Tax Court in its ultimate conclusion, notwithstanding the uncontradicted testimony.

The Tax Court found:

(1) "This cancer had been six months in formation prior to the operation and had been perceptible for two months prior thereto." (R. 29, Respondent's Brief 3).

The testimony of the Doctor does not permit of such a flat statement.

The Doctor said, (R. 88–89):

"Q. Did she say how long it (the lump on the breast, in 1938) had been there? A. No. She said it was only a few days, but I knew, from my experience, that it had been there a couple of months.

"Q. How long, could you say? A. I don't know. It was certainly a matter of six months, from what I know from my thirty-four years of practicing.

"Q. It would have been perceptible for at least two months? A. It would have. But the patient wouldn't know of it unless she actually came across it, perhaps accidentally.

"Q. Did she say how long it was that she had found it? A. She had seen it only a few days, that is definite."

At page 134, decedent's sister, Belle Preston, also says that decedent had known about the lump on her breast only a few days, and that while it seemed to be like the one she herself had had removed some years before, she counselled decedent to tell her husband about it immediately. Further-

more, the operation was completely successful, the wound healed perfectly, and there was no cancer there. (R. 80–81).

(2) "The certificate of decedent's death gives the primary cause thereof as carcinoma of the lungs existing for ten months and the contributary cause thereof as chronic myocarditis which existed for one year." (R. 33, Respondent's Brief 5).

The Doctor said, (R. 93):

"May I say one thing about the death certificate, I wanted to make the statement—and I told the undertaker that—that Mrs. Bassett died of acute dilation of the heart, although she had a cancer of the lung.

"He immediately called the Department of Health, and he told me that it was out of order because, whenever anybody died they died of heart failure, so they asked me to put down the cause of death as carcinoma of the lung and acute dilation.

"Now most of these acute dilations of the heart are due to a blood clot or to age.

"I simply stated that because the Department of Health asked for it that way."

The Tax Court noted, in its Opinion:

(1) That there was a cessation of gifts by the decedent from 1932 to 1940.

The testimony of decedent's husband, (R. 97–98), is that they ceased their regular joint gifts from 1932 until 1940, because of the depression and of the fact that during that time his law practice had suffered very materially, (R. 97–98). The joint nature of the gifts made by the decedent and her husband, found at pp. 31, and 149–153, is virtually ignored.

(2) That decedent became inordinately energetic in the disposition of her resources, after January 23, 1941.

The fact that Mr. Bassett resumed making similar gifts at the same time, (R. 151) is again ignored.

Neither of these comments of the Tax Court are contained in the findings of fact; they are in the Opinion.

Furthermore, the uncontradicted testimony establishes impelling motives other than death for the making of these joint gifts.

At the conclusion of the statement of the facts, Respondent then says, (Brief in Opposition, p. 5):

> "The Tax Court held that the gifts made by the decedent during 1941 and 1942 were made in contemplation of death and as a substitute for testimentary disposition."

As pointed out above, the Tax Court so "held" in its Opinion. It made no such finding of fact. Its conclusion is an expression of opinion without evidence to support it, and in fact is contrary to the uncontradicted evidence.

In the presence of the testimony of the Doctor and of decedent's husband and sister, the Member having no special or expert knowledge of the subject, the Tax Court concluded that—being intelligent and religious, decedent must have known she had cancer and must, therefore, have made the gifts in 1941 and 1942, in contemplation of death.

While the Tax Court must necessarily draw inferences from the facts, to determine the ultimate fact required to be found in this case, that Court should not be permitted to base its decision on what it believes goes on in the mind of an intelligent and religious woman—when that opinion is contrary to all uncontradicted testimony.

It is inconceivable that, the foregoing being true, the Court of Appeals could conclude that the decision of the Tax Court was not "clearly erroneous".

Indeed, the sanction by the Court of Appeals of the departure by the Tax Court from the usual course of judicial proceedings is urged to be alone ample grounds for granting a review of this case.

CONCLUSION

It is respectfully submitted that the question presented in this case involves important questions of Federal law which have not, but should be, settled by this Court, and was decided in a way in conflict with applicable decisions of this Court, and that the Court of Appeals so far departed from the usual course of judicial proceedings and, at the same time, so far sanctioned such departure by the Tax Court, as to call for an exercise of this Court's power of supervision. The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

PREW SAVOY,
Counsel for Petitioner.

CHAUNCEY P. CARTER
HOWARD M. BASSETT,
Of Counsel.

APPENDIX I

ANNUAL REPORTS OF COMMISSIONER OF INTERNAL REVENUE

Year Ending June 30	*Number of Returns Filed*		*Amounts Collected*
	Estate Tax	*Gift Tax**	*Gift Tax*
1933	8,504	1,716	$ 4,616,661.96
1934	11,210	3,619	9,153,076.06
1935	13,133	11,410	71,671,277.00
1936	13,252	22,590	160,058,761.00
1937	15,244	17,046	23,911,783.00
1938	17,794	16,601	34,698,739.00
1939	18,265	13,614	28,435,597.00
1940	18,908	14,435	29,185,118.00
1941	19,044	17,369	51,863,714.00
1942	19,633	30,048	92,217,383.00
1943	18,430	23,872	32,965,079.00
1944	17,205	20,772	37,744,732.00
1945	17,927	22,939	46,917,583.00
1946	19,704	23,554	47,231,605.00
1947	23,209	27,046	70,497,262.00
1948	ESTIMATED		65,000,000.00
1949	ESTIMATED		66,000,000.00

* Gift tax returns are based upon taxable net gifts made in the preceding calendar year, after exclusions and in excess of exemptions.

APPENDIX II

INTERNAL REVENUE CODE

Sec. 811(c). Transfers in Contemplation of, or Taking Effect at Death.—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. *Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this subchapter;* (Italics supplied).

APPENDIX III

REVENUE ACT OF 1926

Sec. 302(c). To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. *Where within two years prior to his death* but after the enactment of this Act and without such a consideration *the decedent has made a transfer or transfers* by trust or otherwise, *of any of his property* or an interest therein, *not admitted or shown to have been made in contemplation of* or intended to take effect in possession or enjoyment at or after his *death, and the value or aggregate value,* at the time of such death, *of the property or interest so transferred to any one person is in excess of $5,000, then, to the extent of such excess,* such transfer or transfers shall be deemed and held to have been made in *contemplation of death* within the meaning of this title. *Any transfer of a material part of his property* in the nature of a final disposition or distribution thereof, *made by the decedent within two years prior to his death* but prior to the enactment of this Act, without such consideration, shall, *unless shown to the contrary, be deemed to have been made in contemplation of death* within the meaning of this title. (Italics supplied.)

APPENDIX IV

Hearings Before Ways and Means Committee on

REVENUE REVISION OF 1942

(Statement of Roy C. Osgood, Chicago, Ill., Representing Committee on Federal Finance, United States Chamber of Commerce.)

Page 2819:

Tax Increases by Exemption Changes

* * * * *

(b) Gift tax exclusion of $5,000 per donor.—The proposal to limit the gift tax exclusion to $5,000 for each donor regardless of the number of donees has a direct effect upon the morale of our armed forces. It is a well-known fact that many individuals with dependents have enlisted in the Army or Navy with the understanding that their parents will take adequate care of such dependents. This proposal will in many cases intensify such a continued responsibility. A father with sons in the armed services will find it more difficult to care for sons' wives and children.

It may be pointed out that in addition to the proposed exclusion there is the general gift tax exemption. However, in cases where liberal exclusions will be most needed the general exemption will have been exhausted in prior years. The imposition of increased income taxes along with the proposed gift taxes makes the continued care of such dependents a heavier burden for persons of moderate capital savings.

It must be remembered that the gift tax exclusion represents the only means by which, without adding to

his tax burden, one can care for persons to whom the donor owes a moral duty to support and maintain. Over-age servants, indigent relatives, widowed daughter-in-law, education of grandchildren, all must come within the gift tax exclusion or the ability to provide for their sustenance may cease. On every dollar of gift over the exclusion the donor must pay a gift tax and if the gift is made from income its full amount is subject to income tax where received by the donor. Thus in a wartime support situation the donor has, first the added financial burden, second an added income-tax burden on the income received and third a gift-tax burden for all gifts above the amount of the exclusion.

One method of correcting the situation would be to exclude from gift tax all sums expended for the support, maintenance, and education of persons to whom the donor owes any moral obligation. This, however, would result in so many administrative difficulties that it is impracticable. Moral obligations are difficult to test objectively and if a subjective test were applied the door to avoidance and evasion would be opened. Hence the only logical solution is a gift tax exclusion similar to that existing at the present time.

(There was also a statement by Ellsworth C. Alvord, as Chairman of the Committee on Federal Finance of the Chamber of Commerce of the United States, on the subject of extending the exclusions from the gift tax. P. 2809.)

INDEX

CITATIONS

Cases:

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Miscellaneous:

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 595

ESTATE OF ANNIE PRESTON BASSETT, DECEASED,
PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 27-39) are unreported. The opinion of the Court of Appeals (R. 165-167) is reported in 170 F. 2d 916.

JURISDICTION

The judgment of the Court of Appeals was entered November 29, 1948. (R. 168-169.) The peti-

tion for a writ of certiorari was filed February 24, 1949. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

Whether gifts made by the decedent within two years of her death were transfers made in contemplation of death within the meaning of Section 811(c) of the Internal Revenue Code and should be included in the decedent's gross estate.

STATUTE AND REGULATIONS INVOLVED

The applicable statute and regulations involved are set forth in the Appendix, *infra,* pp. 10-13.

STATEMENT

The facts as found by the Tax Court (R. 27-33) may be summarized as follows:

Annie Preston Bassett was born May 12, 1865. She died testate January 22, 1942, leaving her husband, Edward M. Bassett, executor of her estate, and five children and 15 grandchildren. During the married life of decedent and her husband the latter, who was a practicing lawyer, had divided his income with his wife in such a way that their income from investments was about equal. (R. 27-28.)

In 1920 decedent and her husband began making gifts to their children. These gifts, so far as decedent was concerned, began on December 15, 1922, and a tabulation of these gifts up through March 1, 1932, with the amounts as evaluated by decedent's

husband appears in the record. (R. 28.) Decedent made no gifts from March 1, 1932, to March 1, 1940. (R. 29.)

Decedent was the daughter of a Presbyterian minister, was a graduate of Wellesley and had taught school for a number of years. She was active in literary societies, and also in the work of her church, the work of the Young Women's League and in the Red Cross. She had traveled extensively and was a very earnest reader on all subjects of general interest and matters pertaining to health. She frequently prepared papers to be presented before groups. (R. 29.)

On November 25, 1938, decedent made a will in which she bequeathed her real estate, household goods and belongings to her husband and her residuary estate to her five children share and share alike or the heir of each child *per stirpes*. In less than two weeks thereafter she informed her husband that she had discovered a lump in her right breast. Her husband took her at once to a surgeon and the lump was diagnosed as a scirrhus carcinoma. This cancer had been six months in formation prior to the operation and had been perceptible for two months prior thereto. The officiating surgeon operated the next day but did not inform decedent of the nature of her illness, although the patient asked him if he thought she had a cancer. Following the operation a number of X-ray treatments were given the patient but the wound healed with-

out any complications and there was no evidence of a recurrence of the cancerous condition in any other locality at that time. (R. 29.)

In the early part of 1941 a cough, which decedent had been experiencing for some time prior thereto, developed so that she again visited her surgeon on January 23, and on May 12, 1941. On May 16, 1941, an X-ray picture of the lung which was taken indicated to the surgeon the probable existence of a cancer in that organ. X-ray treatments were immediately renewed and continued for several months. On December 9, 1941, an X-ray photograph was made which showed the definite existence of a cancer in the right lung. The surgeon informed decedent's daughter of his suspicions after the first X-ray picture was taken in May. In the latter part of 1941 pneumonia developed and the general condition of the decedent became progressively worse. In December she realized she was not getting well, although she gave no evidence of being in fear of imminent death and laid plans which provided for her continued existence during the year 1942. (R. 30.)

On March 1, 1940, decedent again initiated the disposition of her property through gifts, the last series of which were made on January 12, 1942, ten days before her death. These gifts as evaluated by decedent's husband amounted to $210,487 and consisted of mortgages, bonds and cash. The gifts were made to decedent's five children, 15

grandchildren, two sons-in-law and two daughters-in-law. (R. 30-31.)

The certificate of decedent's death gives the primary cause as carcinoma of the lungs existing for ten months and the contributory cause thereof as chronic myocarditis which existed for one year. (R. 33.)

The Tax Court held that the gifts made by the decedent during 1941 and 1942 were made in contemplation of death and as a substitute for testamentary disposition. Accordingly it decided that the amount of such gifts must be included in the gross estate. (R. 39.)

The decision of the Tax Court on the only issue involved here was affirmed by the Court of Appeals. (R. 167.)

ARGUMENT

The only question here is whether the gifts which the decedent made in 1941 and 1942 were in contemplation of death and therefore includible in the gross estate under Section 811(c) of the Internal Revenue Code (Appendix, *infra*).

This Court has held that, although death may not be considered imminent, a transfer is made in contemplation of death if the thought of death is the dominant or impelling motive. *Allen* v. *Trust Co. of Georgia,* 326 U. S. 630; *City Bank Co.* v. *McGowan,* 323 U. S. 594, 599; *United States* v. *Wells,* 283 U. S. 102, 116-117. Accordingly the test is to be found in motive and the question as to what

has been the dominant motive of a decedent is one of fact. *Colorado Bank* v. *Commissioner,* 305 U. S. 23; *United States* v. *Wells, supra.*

Certainly there is ample evidence here to support the Tax Court's conclusion that the gifts in question were made in contemplation of death, without the necessity of resorting to the statutory presumption. Hence its finding should be accepted here. *Allen* v. *Trust Co. of Georgia, supra; United States* v. *O'Donnell,* 303 U. S. 501, 508.

It is true that the Court of Appeals stated that the statutory presumption had not been overcome in the conjunctive with its ruling that the Tax Court's finding was not clearly erroneous. Nevertheless, the Tax Court's conclusion that the gifts made in 1941 and 1942 were made in contemplation of death and as a substitute for testamentary disposition was based not upon the statutory presumption but upon the record as a whole. This is made clear by the fact that gifts made by the decedent on March 1, 1940, though within two years from the date of decedent's death, were not included in the Tax Court's finding.

The decedent was an intelligent and well-educated woman who was nearly 77 years of age at the time of her death. During the last two years of her life she made gifts of over $210,000 and died with an estate reported at less than $10,000 subject to tax. (R. 38.)

Decedent had made gifts from 1922 to 1932 which are not involved here. As the Tax Court points out, after discontinuing all gifts for over eight years decedent's donative activities were suddenly revived on March 1, 1940. In the meantime, in 1938, decedent had developed a cancer in her breast. Her breast had been amputated, and on December 9, 1938, she had asked her physician whether or not he had removed a cancer. She received no reply, but did receive X-ray treatments. Just prior to her operation she had made her will.

On January 23, 1941, she had again consulted her physician, an X-ray picture had been taken which was again immediately followed by X-ray treatments. The doctor informed decedent's daughter that decedent might have a cancer of the lung. With an uncontrollable cough, and while taking X-ray treatments, the decedent "became inordinately energetic in the disposition of her resources." (R. 30, 38.) She made gifts of approximately $12,000 to each of her five children. Shortly thereafter she gave $60,000 to her fifteen grandchildren, and then approximately $16,000 to her four daughters-in-law and sons-in-law; and finally within ten days from the date of her death she gave over $30,000 equally divided among four of her children and their spouses.

From the above it is readily seen that there is no necessity for the application of the statutory pre-

sumption. Section 811(c) of the Internal Revenue code requires the inclusion for estate tax purposes of any property which the decedent has at any time made transfer in contemplation of death. The same section also provides:

> Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death * * * shall, unless shown to the contrary, be deemed to have been made in contemplation of death * * *.

We submit that the Court of Appeals was correct in ruling that while none of the separate gifts here was a material part of decedent's property, yet as the gifts aggregated over half of her estate, the statutory presumption applies. Any other interpretation of the statute would defeat its purpose, and one could dispose of his entire estate without fear of presumption, merely by making a number of small transfers, even though they were made to the same person.

The petitioner contends for the first time in this Court that any transfer of less than $5,000 though made in contemplation of death "must be excluded from the point of view both of convenience and purposes in view." (Pet. Br. 18.) Not having raised the question below, it is not entitled to have it decided here. *Helvering* v. *Minnesota Tea Co.*, 296 U. S. 378, 380. In any event, we submit that the petitioner's contention is without merit.

It is true that the Regulations provide that all transfers of an amount of $5,000 or more must be disclosed in the estate tax return. Regulations 105, Articles 81.15, 81.16 (Appendix, *infra*). It is clear that the purpose of the regulation is to eliminate the administrative necessity of examining small isolated gifts. Its purpose is not to exempt series or numerous gifts of small amounts which together aggregate a material part of a decedent's estate.

CONCLUSION

The decision below is correct. It presents no conflict and there is no necessity for further review.

Respectfully submitted,

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MARCH, 1949.

APPENDIX

Internal Revenue Code:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * * *

(c) *Transfers in Contemplation of, or Taking Effect at Death.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such con-

sideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this subchapter;

* * * *

(26 U. S. C. 1946 ed., Sec. 811.)

Treasury Regulations 105, promulgated under the Internal Revenue Code:

SEC. 81.15. *Transfers during life.*—The following classes of transfers made by the decedent prior to his death, whether in trust or otherwise, if not constituting bona fide sales for an adequate and full consideration in money or money's worth, are subject to the tax: (1) transfers in contemplation of death (see section 81.16); * * *

* * * * *

All transfers made by the decedent during his life of an amount of $5,000 or more, except bona fide sales for an adequate and full consideration in money or money's worth, must be disclosed in the return, whether the executor regards such transfers as subject to the tax or not. If the executor believes that such a transfer is not subject to the tax, a brief statement of the pertinent facts should be made.

SEC. 81.16 [as amended by T. D. 5248, 1943 Cum. Bull. 1113] *Transfers in contemplation of death.*—Transfers in contemplation of death made by the decedent after September 8, 1916, other than bona fide sales for an adequate and full consideration in money or money's worth, must be included in the gross estate. A trans-

fer in contemplation of death is subject to the tax although the decedent parted absolutely and immediately with his title to, and possession and enjoyment of, the property.

The phrase "contemplation of death," as used in the statute, does not mean, on the one hand, that general expectation of death such as all persons entertain, nor, on the other, is its meaning restricted to an apprehension that death is imminent or near. A transfer in contemplation of death is a disposition of property prompted by the thought of death (though it need not be solely so prompted). A transfer is prompted by the thought of death if it is made with the purpose of avoiding the tax, or as a substitute for a testamentary disposition of the property, or for any other motive associated with death. The bodily and mental condition of the decedent and all other attendant facts and circumstances are to be scrutinized to determine whether or not such thought prompted the disposition.

Any transfer without an adequate and full consideration in money or money's worth, made by the decedent within two years of his death, of a material part of his property in the nature of a final disposition or distribution thereof, is, unless shown to the contrary, deemed to have been made in contemplation of death.

If the executor contends that the value of a transfer of $5,000 or more made by the decedent subsequent to September 8, 1916, should not be included in the gross estate because he

considers that such transfer was not made in contemplation of death, he should file sworn statements with the return, in duplicate, of all the material facts and circumstances, including those directly or indirectly indicating the decedent's motive in making the transfer and his mental and physical condition at that time, and one copy of the death certificate.

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